Supreme Court, U.S.
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No. 91-1406

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

AMERICAN TRAIN DISPATCHERS ASSOCIATION,
Petitioner,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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April 1992

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QUESTION PRESENTED

Whether, under the Railway Labor Act, a labor union may compel a railroad to arbitrate a claim before the National Railroad Adjustment Board when deciding the claim would require that board to resolve a question—whether the union represents certain of the railroad's employees—that is within the exclusive jurisdiction of the National Mediation Board.

LIST OF PARENT AND SUBSIDIARY COMPANIES

The common stock of respondent Norfolk Southern Railway Company (named "Southern Railway Company" until December 31, 1990) is wholly owned by Norfolk Southern Corporation, the stock of which is publicly held. The preferred stock of respondent Norfolk Southern Railway Company is publicly held. The subsidiaries of respondent, other than wholly owned subsidiaries, are:

High Point, Randleman, Asheboro and Southern Railroad Company
Mobile and Birmingham Railroad Company
Norfolk and Portsmouth Belt Line Railroad Company
North Carolina Midland Railroad Company, The
South Western Rail Road Company, The
State University Railroad Company
Yadkin Railroad Company

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Norfolk Southern Railway Company ("Southern") respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The November 1, 1991 decision of the court of appeals is reported at 948 F.2d 887 and is reproduced in the appendix to the petition ("Pet. App.") at 1a. The district court's January 10, 1990 memorandum and order is not reported and is reproduced in the

appendix to the petition at 16a. The district court's January 16, 1990 judgment, which was separately appealed, is not reported and is reproduced in the appendix to the petition at 28a.

JURISDICTION

The court of appeals entered its decision on November 1, 1991. The petition for rehearing and suggestion for rehearing en banc were denied by the court of appeals on December 2, 1991 (Pet. App. 14a-15a). The petition for a writ of certiorari was filed on March 2, 1992. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 2 Ninth of the Railway Labor Act, 45 U.S.C. § 152 Ninth, provides:

> If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board

shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

STATEMENT OF THE CASE

The petition seeks review of a decision of the United States Court of Appeals for the Fourth Circuit affirming an order and judgment of the United States District Court for the District of South Carolina which granted the motion of respondent Southern for summary judgment, and denied the cross-motion of petitioner American Train Dispatchers Association ("ATDA") for summary judgment, on the civil action brought by Southern against ATDA. Southern operates an interstate railroad system throughout the southeastern, south central, and midwestern United

States.[1] ATDA, a labor union, is a representative of Southern's train dispatchers for purposes of collective bargaining under the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.*[2] ATDA had filed an arbitration case with the National Railroad Adjustment Board ("NRAB"), a federal agency that presides over the arbitration of labor agreement disputes under RLA § 3, 45 U.S.C. § 153. In its civil action, Southern had invoked RLA § 2 Ninth, 45 U.S.C. § 152 Ninth, seeking to require ATDA to withdraw its NRAB case on the ground that deciding that case would require the arbitration panel to decide whether the union represents certain employees *other* than train dispatchers, and that such a decision is within the exclusive jurisdiction of the National Mediation Board.

This case involves the interests of thirteen non-union, salaried, management employees of Southern known as "superintendents, transportation-locomotive" ("STLs"). These employees are not represented by ATDA or any other labor organization, and their work is not subject to any collective bargaining agreement. The STLs work in Southern's Atlanta, Georgia facility known as the Control Center and perform

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[1] Until December 31, 1990, Southern's name was "Southern Railway Company," which is the name that is used in the decisions of the courts below. The name change had no effect on any legal right or obligation of Southern.

[2] A "representative" under the RLA is "any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them." 45 U.S.C. § 151 Sixth. A union can become a representative of employees only through voluntary recognition by the carrier, or through the procedures established in RLA § 2 Ninth, 45 U.S.C. § 152 Ninth, for the certification of representatives by the National Mediation Board.

work known as "distribution of power"—the assignment of locomotives to particular trains and facilities—throughout Southern's railroad system. Southern has used management STLs to perform this work since 1965.[3]

As bargaining representative for Southern's employees in the "craft or class" of train dispatchers,[4] ATDA has negotiated with Southern a basic collective bargaining agreement known as the train dispatchers' "schedule agreement." That agreement provides a comprehensive set of wages, rules and working conditions for Southern's train dispatchers.

The schedule agreement provides ATDA with a procedure for claiming that power distribution work belongs to train dispatchers. Such a claim would be founded on the schedule agreement's "scope rule," which defines the work that train dispatchers are contractually entitled to perform. In a scope rule claim, ATDA would allege that Southern has been violating the schedule agreement by allowing persons who are not train dispatchers—the STLs—to perform power distribution work that assertedly is reserved to train dispatchers under the scope rule. In such a claim, the

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[3] The STLs are also the employees of Southern who were involved in *Norfolk & Western Ry. v. American Train Dispatchers Ass'n*, 111 S. Ct. 1156 (1991).

[4] RLA § 2 Fourth, 45 U.S.C. § 152 Fourth, provides that employees "shall have the right to organize and bargain with representatives of their own choosing" and that the majority of any "craft or class" shall have the right to determine the representative of that "craft or class." The term "craft or class" is used to define the bargaining unit designated by the Mediation Board in connection with an election of representatives.

relief sought would be to have train dispatchers paid as though they were performing the work that allegedly had been taken away from them in violation of the schedule agreement. ATDA has never brought such a claim since STLs began performing power distribution work in 1965.[5]

ATDA has instead taken a different tack, with a goal of obtaining something other than conventional scope rule relief. ATDA and Southern, along with many of the nation's larger railroads, are parties to another collective bargaining agreement, the National Agreement of May 27, 1937, as revised May 30, 1979 (generally known in the railroad industry as the "37/79 Agreement"). The 37/79 Agreement was intended to provide a means by which train dispatchers could raise with their employers concerns about the safety and working conditions of train dispatchers that are not addressed in the train dispatchers' schedule agreements on the separate railroads. Paragraph 4 of the 37/79 Agreement provides:

> Any Train Dispatcher shall have the right to bring to the attention of the management, directly or through his designated and authorized representative, any conditions or practices involving safety in train dispatchers service, or involving working conditions of train dispatchers not covered by existing agreements or agreements that may here-

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[5] In response to any such claim, Southern, of course, would dispute that the scope rule somehow gives train dispatchers a contractual entitlement to work that, with ATDA's acquiescence, train dispatchers have not performed in the lifetime of the schedule agreement.

> after be negotiated between railroads and train dispatchers.[6]

Under the procedure established by the 37/79 Agreement for the consideration of complaints brought under paragraph 4, a train dispatcher must first submit his complaint to the railroad, and then may appeal the matter to a labor-management "Joint Committee." The Joint Committee is not constituted as an arbitration panel; rather, it is composed of three carrier representatives and three representatives of ATDA, all of whom have equal voting power.

On March 14, 1988, ATDA's general chairman for Southern's train dispatchers filed a complaint with Southern, assertedly under the procedure of paragraph 4 of the 37/79 Agreement. In that complaint—filed nearly a quarter of a century after Southern began using STLs to perform distribution of power work—ATDA demanded that Southern reclassify and rename the STL positions as "Assistant Chief, Night Chief or Chief Train Dispatchers." The complaint cited paragraph 3 of the 37/79 Agreement, which states:

> Positions, the duties of which fall within the scope of the Train Dispatcher Group, as the duties of that group are described by the Interstate Com-

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[6] Paragraph 4 lists thirteen subjects intended to fall within the scope of the Agreement: adequate force; rest days; extent of dispatching territory; number of communicating circuits; number of train sheets and train order books to be handled; use of train dispatching circuits; location of office at points where train dispatchers are employed; privacy and elimination of noise and interference; proper equipment and arrangement of office; lighting, heating, cooling, ventilation, etc.; proximity of wash rooms, toilets, etc.; proper drinking water conveniently located; and methods of recording motor and/or track car line-ups.

> merce Commission in its Order, generally known as the "Occupational Classification," effective July 1, 1921, or as such Order has been or hereafter may be amended, shall be properly classified.[7]

Southern declined the request, and ATDA sought to appeal its complaint to the Joint Committee. Southern took the position that the Joint Committee lacked jurisdiction to consider ATDA's complaint because the committee's jurisdiction is limited to the investigation of complaints brought by or on behalf of train dispatchers, and Southern's STLs, on whose behalf the complaint was brought, are not train dispatchers.

ATDA withdrew its appeal, "without prejudice," and then, on July 7, 1989, filed with the NRAB's Third Division, which has jurisdiction over arbitration cases involving train dispatchers, a "notice of intent

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[7] The Occupational Classification Order to which paragraph 3 refers describes the duties of train dispatchers and governs carriers "in the preparation and submission of their annual and other periodic reports to the Interstate Commerce Commission." 49 C.F.R. § 1245.1. The Occupational Classification Order divides train dispatchers into two groups or "grades." Grade 1 consists of the position of "Train Dispatcher" and includes employees who are primarily responsible for, or who supervise others who are primarily responsible for, the movement of trains by train orders. Grade 2 consists of the positions of "Assistant Chief Train Dispatcher" and "Chief Train Dispatcher." "Night Chief Train Dispatcher" is included in Grade 2 as an example of "Assistant Chief Train Dispatcher." Employees classified under Grade 2 are responsible for the movement of trains on a division or other assigned territory, involving the supervision of train dispatchers and other similar employees; the supervision of the handling of trains and the distribution of power and equipment incident thereto; and the performance of related work. *Id.*

to file an *ex parte* submission" with respect to the following claim:

> Does the Joint Committee created under the provisions of the National Agreement Dated May 30, 1979 (amending the May 27, 1937 National Agreement) between railroads represented by the NATIONAL CARRIERS' CONFERENCE COMMITTEE and employees of such railroads represented by the AMERICAN TRAIN DISPATCHERS ASSOCIATION, have jurisdiction to consider an appeal of the complaint concerning proper classification of positions presently designated Superintendent, Transportation-Locomotive, dated March 14, 1988?

Because the NRAB has no procedure that allows for a threshold determination as to jurisdiction, Southern therefore became obligated, as far as the NRAB was concerned, to participate in the arbitration proceeding on the merits of ATDA's claim.

Southern filed its civil action on August 24, 1989, seeking a judgment declaring that, under the RLA, the National Mediation Board, not the NRAB, has exclusive jurisdiction to resolve the question whether STLs should be brought within the craft or class of train dispatchers, and therefore within the scope of ATDA's representation; and, accordingly, that ATDA may not prosecute before the NRAB the dispute over whether the Joint Committee has jurisdiction to consider an appeal concerning proper classification of the STL positions. Southern also sought an injunction to prevent ATDA from prosecuting its claim before the wrong statutory forum.

On cross-motions for summary judgment, the district court held that deciding the claim ATDA had submitted to the NRAB for arbitration would require the NRAB to determine whether ATDA represents Southern's STLs under the RLA, and that such a determination is within the Mediation Board's exclusive jurisdiction. Pet. App. 23a, 27a, 28a. Invoking the rule that the federal courts are empowered to grant injunctive relief " 'to vindicate the processes of the Railway Labor Act,' " *id.* 25a n.3 (quoting *Bhd. of Railroad Trainmen v. Chicago River & Indiana R.R.*, 353 U.S. 30, 41 (1957)), the district court enjoined ATDA from prosecuting before the NRAB the representation dispute over the reclassification of Southern's STLs. Pet. App. 27a, 29a.

The court of appeals affirmed, concluding that ATDA had sought to present a dispute to the NRAB for arbitration that "is plainly a representation dispute" subject to the Mediation Board's exclusive jurisdiction. Pet. App. 8a. The court determined that "the heart" of the union's claim before the NRAB was a representation dispute because reclassification of the STL positions from management to dispatcher would sweep those positions within the scope of the union's representation. *Id.* As a prerequisite to Joint Committee jurisdiction, the court explained, the 37/79 Agreement requires that a dispute concern the "working conditions of train dispatchers," and "[d]etermining whether this prerequisite has been met in this case would require the Adjustment Board to decide whether the dispute is one over the working conditions of dispatchers, that class of employees which the Union represents." *Id.* 10a. The court found that ATDA's assertion that the dispute concerned the

working conditions of *existing* train dispatchers "ignores the facts," because it is the work being performed by STLs, not current dispatchers, that ATDA wished to have reclassified, and it is the wages, benefits, and responsibilities of STLs, not current dispatchers, that the union sought to change through reclassification. *Id.*

The court of appeals concluded that, even if interpretation of the 37/79 Agreement was required, the dispute submitted by ATDA for arbitration was not a so-called "minor dispute" within the NRAB's jurisdiction,[8] because "the dispute clearly implicates representation concerns." Pet. App. 11a. The court explained that "[i]t has been established that when a minor dispute and a representation dispute overlap, the matter should go before the Mediation Board." *Id.* (citing *Flight Engineers' Int'l Ass'n v. Pan American World Airways, Inc.*, 896 F.2d 672, 673 (2d Cir.), *cert. denied*, 495 U.S. 953 (1990); *Independent Union of Flight Attendants v. Pan American World Airways, Inc.*, 664 F. Supp. 156, 158 (S.D.N.Y. 1987), *aff'd*, 836 F.2d 130 (2d Cir. 1988)).

The court of appeals found no merit to the union's jurisdictional challenges to Southern's lawsuit. The court rejected ATDA's contention that, because the RLA permits review of NRAB decisions, the district court lacked jurisdiction to decide Southern's claim.

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[8] "Minor disputes" are those growing "out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions," 45 U.S.C. § 153 First (i). Minor disputes involve the enforcement of vested contract rights and "may be conclusively resolved by interpreting" existing agreements. *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n*, 491 U.S. 299, 305 (1989).

The court reasoned that, under *Leedom v. Kyne*, 358 U.S. 184 (1958), and the Fourth Circuit's application of that decision in *Champion Int'l Corp. v. EPA*, 850 F.2d 182 (4th Cir. 1988), the district court possessed jurisdiction to determine whether the NRAB would be exceeding its statutory authority in considering ATDA's arbitration case. The court of appeals concluded that the district court "was acting within its subject matter jurisdiction" because it decided only this issue. Pet. App. 12a.

Finally, the court of appeals also rejected a contention that Southern lacked standing to sue because assertedly only the interests of the STLs themselves were implicated in the dispute. The court held that Southern's standing was demonstrated by the fact that Southern was "acting on its own behalf in seeking to be released from an improper assertion of jurisdiction" by the NRAB and was "seeking to avoid the dedication of time, effort, and money to a proceeding that is manifestly beyond the jurisdiction of the agency hearing it." *Id.* 13a.

ARGUMENT

1. The court of appeals was plainly correct in determining that the dispute ATDA presented to the NRAB for arbitration was a representation dispute and therefore outside that board's jurisdiction. At its heart, ATDA's assertedly arbitrable question was *precisely* whether the union is to be treated as the RLA representative of Southern's STLs. The court of appeals rightly declined to allow ATDA to use its artificially cast arbitration proceeding to achieve this recognition, and made clear that if this union wishes to bring the STLs within the scope of its represen-

tation, it will have to attempt to do so by means of a properly instituted National Mediation Board proceeding.

The RLA, in § 2 Ninth, specifically assigns resolution of representation disputes solely to the Mediation Board. 45 U.S.C. § 152 Ninth. The jurisdiction of the Mediation Board is plenary and exclusive, *General Committee of Adjustment v. Missouri-Kansas-Texas R.R.*, 320 U.S. 323, 336 (1943)—so exclusive that its representation determinations are not ordinarily subject to judicial review, *Switchmen's Union of North America v. NMB*, 320 U.S. 297, 302 (1943); *Order of Railway Conductors v. Pennsylvania R.R.*, 323 U.S. 166 (1944).

There is no doubt that the Mediation Board's exclusive role in representation matters is central to this lawsuit, and to the decision of the court of appeals. RLA § 2 Ninth is " 'mandatory in form and capable of enforcement by judicial process.' " *General Committee of Adjustment v. Missouri-Kansas-Texas R.R.*, 320 U.S. at 331 (quoting *Virginian Ry. v. System Federation No. 40*, 300 U.S. 515, 545 (1937)). The governing principle is that a party may not circumvent the Mediation Board's exclusive role by submitting an artfully contrived question to arbitration before a different agency and then asserting that the wrong agency's process must be allowed to operate to conclusion. The lower courts have consistently and without difficulty concluded that, to protect the Mediation Board's statutory jurisdiction, a union will not be allowed to use the wrong forum—whether a court[9]

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[9] *E.g., Int'l Bhd. of Teamsters v. Texas Int'l Airlines, Inc.*, 717 F.2d 157, 162-63 (5th Cir. 1983); *Air Line Pilots Ass'n v.*

or an RLA arbitration board[10]—to resolve a claim which implicates representational concerns, even should the claim also involve contract interpretation. The decision of the court of appeals here raises no new issue.

ATDA's petition ignores all this. The union ignores the substance of the dispute it precipitated under the 37/79 Agreement. Instead, ATDA takes as given that its arbitration case raised merely a routine question of contract interpretation as to which the NRAB's jurisdiction would be paramount. The district court and the court of appeals, however, had no trouble understanding that what ATDA was seeking from the NRAB was an arbitration decision that would recognize the union's capacity as representative of Southern's STLs—and no difficulty concluding, in accordance with all the pertinent authorities, that any such use of the NRAB is impermissible. Pet. App. 8a, 10a, 23a-24a. This case therefore has nothing in common with cases, mistakenly relied on by ATDA, which establish the primacy of NRAB jurisdiction where it exists but do not involve representational concerns or the role of the Mediation Board, and

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Texas Int'l Airlines, Inc., 656 F.2d 16, 23-24 (2d Cir. 1981); *Bhd. of Locomotive Firemen & Enginemen v. Seaboard Coast Line R.R.*, 413 F.2d 19, 24 (5th Cir.), *cert. denied*, 396 U.S. 963 (1969); *Order of Railroad Telegraphers v. Leighty*, 298 F.2d 17, 18-21 (4th Cir.), *cert. denied*, 369 U.S. 885 (1962).

[10] *E.g.*, *Flight Engineers' Int'l Ass'n v. Pan American World Airways, Inc.*, 896 F.2d at 673; *Air Line Pilots Ass'n v. Delta Air Lines, Inc.*, 863 F.2d 87, 91 (D.C. Cir. 1988), *cert. denied*, 493 U.S. 821 (1989); *Independent Union of Flight Attendants v. Pan American World Airways, Inc.*, 664 F. Supp. at 158, *aff'd*, 836 F.2d at 131.

which certainly do not counsel the courts to tolerate misuse of the arbitration forum.[11]

ATDA also misses the point when it asserts, Pet. 15-16, that the court of appeals' decision to bar the union from arbitrating its representation dispute somehow depended on that court's finding, Pet. App. 13a, that Southern has a legitimate interest in seeking to avoid being required to participate in an arbitration proceeding that lies outside the RLA structure. The passage cited by ATDA does not set forth the court of appeals' substantive reasons for affirming the issuance of injunctive relief. Rather, in that passage the court of appeals was rejecting a contention made

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[11] *Order of Railway Conductors v. Pitney*, 326 U.S. 561 (1946) (court may not adjudicate dispute between two unions each claiming that certain work falls within the scope of its labor agreement); *Slocum v. Delaware, L. & W. R.R.*, 339 U.S. 239, 240-41, 244-45 (1950) (state court may not resolve a jurisdictional dispute between two unions; noting that Court was "not confronted here with any disagreement or conflict in interest between an employee and his bargaining representative," 339 U.S. at 244 n.7); *Whitehouse v. Illinois Central R.R.*, 349 U.S. 366 (1955) (railroad may not obtain injunction against arbitration proceeding brought by one union on the ground that the dispute involves a conflict of two unions' jurisdictions and the absent union was indispensable to the resolution of the dispute); *Transportation-Communication Employees Union v. Union Pacific R.R.*, 385 U.S. 157 (1966) (NRAB decision declaring certain work to be within the scope of one union's labor agreement remanded, where NRAB had failed to consider the claim of another union which contended the work was covered by its own agreement).

Whitehouse, *Pitney*, and *Transportation-Communication Employees Union* involved conventional "scope rule" claims in which a union asserted a contractual entitlement to perform particular work. Here, ATDA has steadfastly avoided bringing a "scope rule" claim under its schedule agreement with Southern.

by *amicus* (not ATDA) that Southern lacked standing to sue. The court based its affirmance of the injunction against ATDA's pursuit of its case before the NRAB on the plain lack of NRAB jurisdiction under a statute which confers on the Mediation Board the exclusive power to decide representation disputes.[12]

Beyond this, when all else is said, it remains that the particular controversy that ATDA seeks to raise to this Court is an idiosyncratic one, dependent on the peculiar framework of the 37/79 Agreement, which affects only train dispatchers and has no parallel elsewhere in the railroad industry. No broad principle (other than preservation of the Mediation Board's function) is implicated by the court of appeals' decision that ATDA cannot obtain an arbitrator's determination as to whether the union may submit to the Joint Committee established under the 37/79 Agreement a claim on behalf of management STLs that involves those employees' working conditions.

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[12] No new issue is raised in ATDA's untimely "Supplemental Brief," which cites to a decision of this Court announced three months before the filing of the petition. ATDA contends that this case is somehow controlled by *Board of Governors of the Federal Reserve System v. MCorp Financial, Inc.*, 112 S. Ct. 459 (1991), but the union continues not even to mention the exclusivity of the Mediation Board's jurisdiction over representation disputes, the foundation of the court of appeals' decision. Moreover, ATDA disregards the emphasis the *MCorp* Court placed on the fact that the statute there involved contained a provision which expressly denied the district court jurisdiction to enjoin proceedings before the agency in question. 112 S. Ct. at 466. No comparable provision is found in the RLA. To the contrary, it has long been settled that the RLA invests the Mediation Board with exclusive jurisdiction over representation disputes. It is that exclusivity which bars ATDA from submitting the dispute to the NRAB here.

2. There is certainly no relevant conflict among the circuits. ATDA is simply wrong in attempting, Pet. 18-19, to manufacture a conflict between the decision of the court of appeals here and the decision in *Bhd. of Locomotive Engineers v. Denver & Rio Grande Western R.R.*, 411 F.2d 1115 (10th Cir. 1969) ("*BLE v. DRGW*"). There, the Tenth Circuit refused to enjoin an arbitration proceeding when the arbitration board had been properly established pursuant to the RLA by a railroad and a union which *did* represent employees whose grievances were the subject of the arbitration.[13] The Tenth Circuit's decision merely confirms the primacy of arbitral jurisdiction *when it exists*; the decision does not address the Mediation Board's exclusive role in representation disputes, though it does counsel against misuse of the arbitral forum when jurisdiction is absent.[14]

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[13] A second union had sought to enjoin the arbitration proceeding on the ground that the arbitration board created by the railroad and the first union was not properly constituted because the grievances assertedly arose while the employees were performing work that was governed by the labor agreement between the railroad and the second union. The Tenth Circuit concluded that the board was properly established because, under the RLA, an individual may prosecute his or her grievance through any certified representative, not necessarily the collective bargaining representative. 411 F.2d at 1116-17.

[14] The dictum in *BLE v. DRGW* quoted by ATDA, Pet. 18—" 'we should not exercise our injunctive power . . . unless it is made to appear that the invocation of the board was clearly unauthorized and that the exercise of subject matter jurisdiction would leave the Appellant without a remedy' "—is fully consistent with the decision of the court of appeals in this case. ATDA is attempting to force arbitration of a dispute that is manifestly beyond the NRAB's jurisdiction, and after-the-fact judicial review would fail to protect the RLA's statutory scheme,

The court of appeals' decision in this case is fully consistent with the principle, uniformly recognized in the circuits, that the courts should act to protect the Mediation Board's exclusive jurisdiction when, as here, a union attempts to force the resolution of a representation dispute through *any means* other than submission of the matter to the Mediation Board under 45 U.S.C. § 152 Ninth.[15] The decision of the court of appeals is equally consistent with the District of Columbia Circuit's application, in the RLA context, of the principle of *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 649 (1986), that courts are to determine arbitrability in the first instance.[16] And the court of appeals' decision is in line with decisions of the Second Circuit, not

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the interest of Southern in not being compelled to participate in the resolution of a representation dispute in the wrong statutory forum, and the interest of the current STLs in not having their representation decided in a forum in which they lack a voice.

[15] *See, e.g.*, cases cited in footnotes 9 & 10, above. *See also Railway Labor Executives' Ass'n v. Wheeling & Lake Erie Ry.*, 914 F.2d 53, 55-56 (4th Cir. 1990); *Scheduled Skyways, Inc. v. NMB*, 738 F.2d 339, 342 (8th Cir. 1984); *Summit Airlines, Inc. v. Teamsters Local Union No. 295*, 628 F.2d 787, 794-95 (2d Cir. 1980); *Pan American World Airways, Inc. v. Int'l Bhd. of Teamsters*, 275 F. Supp. 986 (S.D.N.Y. 1967), *aff'd sub nom. Bhd. of Railway, Airline & Steamship Clerks v. Pan American World Airways, Inc.*, 404 F.2d 938 (2d Cir. 1969) (per curiam).

[16] *Air Line Pilots Ass'n v. Delta Air Lines, Inc.*, 863 F.2d at 91 (unless the collective bargaining agreement provides clear and unmistakable evidence of a contractual intent that the court be ousted of primary jurisdiction to determine arbitrability, the court, in the first instance, must determine whether a grievance is arbitrable and thus within the jurisdiction of an RLA board of adjustment).

cited by ATDA, holding that, under the RLA, arbitral jurisdiction yields to the Mediation Board's central role in supervising *all* matters pertaining to representation.[17] The lower courts have consistently and properly rejected attempts to divest the Mediation Board of its exclusive jurisdiction, whether by invoking arbitration or through other means.

CONCLUSION

The petition for a writ of certiorari should be denied.

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[17] *Flight Engineers' Int'l Ass'n v. Pan American World Airways, Inc.*, 896 F.2d at 673 (refusing to order arbitration of an asserted RLA contract dispute because a decision on the contract issue would have "implicated representation concerns within the exclusive jurisdiction" of the Mediation Board); *Independent Union of Flight Attendants v. Pan American World Airways, Inc.*, 664 F. Supp. at 158, *aff'd*, 836 F.2d at 131 (same).

ATDA cannot legitimately distinguish the cases arising in the airline industry on the ground that arbitration boards in that industry are not directly established by the statute itself, as they are in the railroad industry, but are created by contract pursuant to the RLA. The duty to arbitrate minor disputes is as much a statutory mandate in the airline industry as it is in the railroad industry; the RLA commands the parties in the airline industry to establish arbitration boards to resolve disputes involving contract interpretation. 45 U.S.C. § 184. Consequently, the nature of the disputes that each forum can decide is the same in both industries.

Respectfully submitted,

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